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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 244

SECURITIES AND EXCHANGE COMMISSION, EDMOND M. HANRAHAN, RICHARD B. MCENTIRE, HARRY A. MCDONALD, AND PAUL R. ROWEN, PETITIONERS

v.

OTIS & CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission and its members, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 1, 1949, which reversed the judgment entered on November 12, 1948, by the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 72-86) has not yet been officially reported. The oral

opinion of the District Court (R. 65-67) has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1949 (R. 86). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (formerly Sections 239 and 240 of the Judicial Code), made applicable by Section 25(a) of the Securities Exchange Act of 1934, 48 Stat. 901, 15 U.S.C. § 78y (a).

QUESTIONS PRESENTED

1. Whether, notwithstanding the doctrine of *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41, a district court has jurisdiction to enjoin the consideration of certain issues in an administrative proceeding unless the agency controverts an allegation that no "new evidence" will be presented in that proceeding beyond that which was considered by the district court in an unsuccessful subpoena-enforcement action brought in aid of an earlier administrative investigation.

2. Whether a holding, in a judicial proceeding for the enforcement of an administrative subpoena, as to the non-existence of a *prima facie* case of fraud sufficient to pierce a claim of attorney-client privilege is *"res judicata"* on the issue of fraud in a subsequent adversary administrative proceeding, in the absence of "new evidence."

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STATUTE INVOLVED

The pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. § 78a *et seq.* (hereinafter referred to as "the Act"), are set forth in the Appendix, *infra*, at pages 21-24.

STATEMENT

The controversy had its genesis in an underwriting contract entered into on February 3, 1948, whereby Otis & Co. and two other firms undertook to purchase from Kaiser-Frazer Corporation a large block of its common stock with a view to effecting a public distribution. It was one condition of the contract that there should be no material litigation pending against Kaiser-Frazer Corporation as of 10:00 a.m. on February 9, which was the settlement date under the contract. The public offering was unsuccessful and was withdrawn by the underwriters. Shortly before 10:00 a.m. on February 9, one Masterson instituted a lawsuit against Kaiser-Frazer Corporation and others in Detroit. On the basis, at least in part, of that suit, Otis & Co. refused to perform its contract. (R. 3-4, 12-13, 23-26.)

On February 18, 1948, the Commission instituted a private investigation to determine, among other things, whether certain anti-fraud provisions of the Securities Exchange Act of 1934 had been violated as a result of the circumstances under which the Masterson suit had been filed (R. 11-14). On the basis of information reported to the Commission by the officers who had conducted that

investigation, the Commission on March 23, 1948, ordered a public investigation (R. 15-17).[1]

During the course of the public investigation, evidence was adduced which, in the Commission's opinion, indicated *prima facie* that the Masterson suit had been inspired by Otis & Co. or by Cyrus S. Eaton, its controlling stockholder (R. 18-21, 23-26). It appeared, among other things, that two Cleveland attorneys, named Harrison and Hull, had made inquiries about that suit at the court house in Detroit prior to its filing on the morning of February 9. As a result of a subpoena-enforcement action in the United States District Court for the Eastern District of Michigan they admitted that the client who had retained them in connection with the suit was Eaton. After the investigation had produced further evidence linking Eaton to the Masterson suit, Harrison and Hull were recalled to appear in Washington and testify concerning their communications with Eaton. They appeared but declined to answer on the ground of attorney-client privilege. Thereupon the presiding officer, upon instructions from the Commis-

[1] The stated purpose of this public investigation included an inquiry not only into the question of misconduct by Otis & Co., but also into the question whether the Commission should prescribe rules and regulations under the Securities Exchange Act or recommend further legislation to the Congress pursuant to Section 21(a) of that Act, 48 Stat. 899, 15 U.S.C. § 78u(a). A counterclaim by Otis & Co. seeking an injunction against further investigation was dismissed by the United States District Court for the District of Columbia in *S.E.C.* v. *Harrison*, 80 F. Supp. 226, discussed *infra*, pp. 5-6. This decision was not appealed and the time for appeal has expired.

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sion, ruled that the privilege was unavailable because the evidence indicated *prima facie* that the communications were for a fraudulent or improper purpose and hence within a well-recognized exception to the privilege. *Clark* v. *United States,* 289 U. S. 1, 15.

Upon the continued refusal of Harrison and Hull to testify, the Commission, on June 25, 1948, filed a second action to compel their testimony under Section 21(c) of the Act, 48 Stat. 899, 15 U.S.C. § 78u(c), this time in the United States District Court for the District of Columbia (R. 18-22). Otis & Co. and Eaton were permitted to intervene in this proceeding. To support the claim of *prima facie* fraud in the institution of the Masterson suit, the Commission, after objection by the defendants and interveners to the use of affidavits, offered the entire record of its public investigation to that date. It was an *ex parte* record of some 5,000 pages made without cross-examination or the right to call witnesses in the orthodox sense (R. 35-37.) The defendants and interveners, by counterclaim, sought to enjoin the Commission's investigation (R. 36-37).

The District Court, relying in part on the absence of cross-examination in the administrative record, held that under the circumstances "the requisite *prima facie* showing of fraud to pierce the attorney-client privilege and relieve the communications here sought to be disclosed from immunity has not been made" (R. 43). Judge Morris emphasized

(R. 44): "The Court, in these proceedings, is not required, nor would it be proper, to make findings as to whether or not the fraud charged was perpetrated, but only to determine whether or not the evidence in the record, without more, constitutes a *prima facie* showing of such fraud." He also made it clear that his decision did not preclude any further inquiries directed even to the same attorneys with respect to anything "other than communications between the intervenor and his attorneys" (R. 44). At the same time he dismissed the counterclaim for an injunction against further investigation of the Masterson suit (R. 45). *S.E.C.* v. *Harrison,* 80 F. Supp. 226.

The case was argued in the District Court on July 19, 20 and 21, and decided on October 18, 1948. On August 11, while the matter was still pending, the Commission had instituted an adversary administrative proceeding against Otis & Co. under Sections 15(b) and 15A(l)(2) of the Act, 49 Stat. 1377, 52 Stat. 1070, 15 U.S.C. §§ 78o(b), 78o-3(l)(2), to determine whether it had violated certain of the anti-fraud and other provisions of the securities statutes and, if so, whether its registration as a broker and dealer should be revoked or whether it should be suspended or expelled from the National Association of Securities Dealers (R. 23-29). Over the objections of the Commission, Otis & Co. and Eaton obtained successive stays from other judges against the holding of hearings in this proceeding pending Judge Morris' decision. After Judge Mor-

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ris had refused to enforce the subpoena and denied the injunction sought by the counterclaim, and the stays had expired, the Commission ordered the administrative hearing on the merits of the case to commence on November 15, 1948 (R. 47-48). This put the Commission in a position to cure the alleged defect of absence of cross-examination, and at the same time to weigh the evidence adduced in the administrative proceeding with a view to reaching a final determination one way or the other, or perhaps reapplying to the court on the basis of the new record if circumstances appeared to warrant such action.[2]

At that point Otis & Co. instituted an independent action in the District Court in which it prayed that the Commission and its members be enjoined from considering in the administrative proceeding the question of the instigation of the Masterson suit and the termination of the underwriting contract (R. 2-10). The complaint sought an injunction against "taking any evidence, compelling attend-

[2] This method of procedure, it was optimistically thought, would avoid the delay attendant upon an appeal. Not one but two appeals might well have been required. The Court of Appeals might have agreed with the Commission that the district judge had applied too strict a standard of proof—in the opinion here sought to be reviewed it did refer to *prima facie* evidence as a "minimum quantity" (R. 83)—and might have remanded for a determination of the question of *prima facie* evidence of fraud under the proper standard. Then, whatever the determination of the District Court on remand, there would probably have been a second appeal. Also, there might thus have been two petitions to this Court for writs of certiorari. All this would have preceded any approach to the merits of the ultimate question of fraud by the only tribunal with jurisdiction to decide that question—the Commission.

unto all hearings, or taking any action whatsoever, with respect to the above matters" (R. 10). The theory of the complaint was that the earlier decision of the District Court had rendered *res judicata* the question whether the Masterson suit had been inspired by Otis & Co. or Eaton (R. 8-9). Judge Morris dismissed the complaint from the bench on the grounds (1) that he had never undertaken to decide the ultimate question of fraud *vel non* in the subpoena action, and (2) that the doctrine of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, required the plaintiff to exhaust its administrative remedy before obtaining judicial review, which could be done in the proper court of appeals pursuant to the statute if the Commission's final order was adverse (R. 65-67).

The plaintiff appealed to the court below and obtained from that court, over the objection of the Commission, an order staying the administrative hearing, in so far as it related to the Masterson suit, pending the appeal (R. 71).[1] The case was argued below on December 17, 1948, and decided on June 1, 1949.

The court below reversed the judgment of the District Court (R. 72-86). The court observed that

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[1] Although the Commission has never been enjoined from conducting its proceeding insofar as the issues therein do not concern the Masterson suit, it has deemed the holding of a hearing on the remaining issues impracticable because the facts involved in the various issues are intertwined; accordingly the Commission has not attempted to proceed pending the determination of this controversy in the courts.

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the complaint in the action for injunction had alleged, on "information and belief," that the Commission "does not have and cannot produce any evidence in addition to that in the record of its so-called public investigation" (R. 75). This allegation, said the court, was admitted by the Commission's motion to dismiss the complaint. Thus the court found an identity of issues making operable the doctrine of *res judicata*. The District Court's prior finding as to absence of probable cause in the subpoena proceeding was held to be decisive as to the merits of the charge of fraud to be heard by the Commission. *Myers* v. *Bethlehem Shipbuilding Corporation* was held to be inapplicable. The court remanded the cause to give the Commission "an opportunity to answer and to deny the allegation that no additional evidence concerning Eaton's collusion will be introduced at its new hearing, and so be relieved of the bar of *res judicata*" (R. 86). The court subsequently stayed its mandate pending the determination of this application for a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a determination of probable cause in a subpoena-enforcement proceeding is *res judicata* as to the ultimate issue which the statute provides shall be decided on the merits by the administrative agency, subject to a limited review by a court of appeals.

2. In holding the issue in a subpoena-enforcement proceeding to be the same as the issue to be decided by the Commission on the merits for purposes of *res judicata.*

3. If it be assumed that the doctrine of *res judicata* is applicable, in enjoining the administrative proceeding rather than allowing the defense of *res judicata* to be raised in due course during the administrative and judicial proceedings prescribed by the statute.

REASONS FOR GRANTING THE WRIT

1. The holding below that *res judicata* creates an exception to the doctrine of primary jurisdiction and the rule against enjoining administrative hearings raises a novel and important question upon which this Court should pass.

The Securities Exchange Act vests in the Commission primary jurisdiction to determine whether the registration of a broker or dealer should be revoked for fraud or whether he should be suspended or expelled from membership in a "national securities association," subject to review only by a court of appeals in the manner specified in the statute.[4] In order to effectuate its primary jurisdiction, the Commission is empowered to seek the aid of a dis-

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[4] The jurisdictional sections are 15(b), 15A(l)(2), 25, 49 Stat. 1377, 52 Stat. 1070, 48 Stat. 901, 15 U.S.C. §§ 78o(b), 78o-3(l)(2), 78y. The fraud sections are 10(b), 15(c)(1), 48 Stat. 891, 52 Stat. 1075, 15 U.S.C. §§ 78j(b), 78o(c)(1), together with specified rules thereunder, and Securities Act of 1933, § 17(a), 48 Stat. 84, 15 U.S.C. § 77q(a).

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trict court to enforce its subpoenas. The decision below invokes a novel sort of *res judicata* doctrine —one which may be avoided by adducing "new evidence"—to make the preliminary determination by the district court in connection with the issuance of a subpoena binding upon the Commission as to the merits of the case unless the district court is first satisfied that the agency has new evidence. This result is in conflict with the statutory scheme whereby the merits of the controversy are first to be submitted to the specialized body established to deal with such problems, and then to a court of appeals (not a district court) to determine whether the administrative decision has a rational basis in fact and in law.

The decision below thus is inconsistent with the doctrines as to primary jurisdiction and the exhaustion of administrative remedies and the oft-repeated rule that administrative hearings cannot be enjoined. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Newport News Shipbuilding and Dry Dock Co.* v. *Schauffler*, 303 U. S. 54; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 545; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 775-81. The fact that the agency may be forced by the recalcitrance of a witness to look to a district court to compel testimony is not adequate basis for transferring the agency's primary jurisdiction to

the district court, or for enjoining the administrative hearing.

It is settled that resort must first be had to the administrative process, even as against an allegation that the administrative body lacks statutory or even constitutional jurisdiction. See cases cited *supra*. The doctrine of *res judicata* is not jurisdictional,[5] and an allegation of *res judicata* certainly has no greater stature than an alleged absence of constitutional or statutory authority. If statutory requirements as to the procedure to be followed must be observed even when the defense is that the statute is inapplicable to the subject matter, the same would seem to be more clearly true with respect to the defense of *res judicata*, a doctrine which lacks the force of an explicit statutory provision.

The decision below appears to turn upon the significance attached to the Commission's "admission" of the allegation that it has no "new evidence" by filing a motion to dismiss. But the fact that allegations which would establish a defense on the merits are admitted for purposes of a motion to dismiss does not justify departure from the rule requiring exhaustion of administrative remedies. The court below made the same error in *Waterman*

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[5] *Philadelphia, Wilmington and Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 334; *United States* v. *Bliss*, 172 U. S. 321, 326; *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 670; *Murrell v. Stock Growers' Nat. Bank of Cheyenne*, 74 F. 2d 827, 832-33 (C.A. 10) and cases cited therein.

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Steamship Corporation v. *Land,* 80 App. D. C. 167, 151 F. 2d 292, reversed *sub nom. Macauley* v. *Waterman Steamship Corporation,* 327 U. S. 540, where it said (151 F. 2d at 294-295):

> And if it is a fact, as the complaint alleges—*and as the motion to dismiss admits*—that the contracts (charter parties) in issue were contracts with the British Government, it follows, of course, that the Commission, in undertaking to investigate profits, is exceeding its statutory powers. [Italics are the court's.]

This Court reversed on the ground that the District Court "lacked jurisdiction to act" (327 U. S. at 545).

As in the *Waterman* case, the court below has again held that an administrative hearing may be displaced in favor of a preliminary judicial inquiry by reason of a pleader's bare allegation of a fact which if true would prove, in the opinion of the court below, that the administrative inquiry would be a fruitless and harassing undertaking. As stated by Justice Arnold in his dissenting opinion in the *Waterman* case (151 F. 2d at 300), "It is naive to think that this device will not be used for purposes of delay."

The type of trial which would be required in this case by the decision below emphasizes the wisdom of not creating an exception to the primary jurisdiction rule. The question at issue would be not whether Otis & Co. had been guilty of fraud, but whether the Commission, if it ultimately were al-

lowed to come to the question of fraud in its administrative proceeding, would be able to make a stronger case than it had made in the *ex parte* investigation. The respondent presumably could prove its allegations that the Commission lacked any new evidence only by taking the testimony of the members of the Commission and Commission attorneys. The District Court would then doubtless be called upon to rule on the substantiality and materiality of any such evidence, a duty which the statute imposes upon the Commission itself. Any District Court decision could be taken to the Court of Appeals and perhaps to this Court, all before the Commission would have an opportunity to hold its hearing on the merits of the case in the manner prescribed by the statute. The possibility of further long delays of proceedings which have already been stayed for almost a year are manifest. This Court has emphasized that, "To be effective, judicial administration should not be leaden-footed," *Cobbledick* v. *United States*, 309 U. S. 323, 325; and this is no less true of law enforcement by administrative agencies and the courts jointly.

The Commission did not argue, as the court below apparently suggests (R. 79-80), that the doctrine of *res judicata* is not applicable to administrative agencies, though when and under what circumstances it is applicable are exceedingly complex questions toward the solution of which the courts are still finding their way. See Davis, *Res Judicata in Administrative Law*, 25 Tex. L. Rev.

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199; Note, *Res Judicata and Intra-Governmental Inconsistencies,* 49 Col. L. Rev. 640. We do maintain, however, that the Congress vested in the Commission the primary fact-finding function as an expert administrative body, and that, when the Congress at the same time gave the Commission no alternative against a recalcitrant witness but to look to the courts to enforce its subpoenas, the Congress could not have intended that the price of failure to obtain court aid should be a surrender of the agency's fact-finding function.[6]

The effect of the decision is to subject an administrative agency to the risk of a one-way surrender of its own ultimate fact-finding jurisdiction to the district court when it seeks to enforce an administrative subpoena against a recalcitrant witness. Although there can be no final determination of the ultimate issues in the agency's favor if the agency *wins* the subpoena proceeding, it is forever barred from exercising its own fact-finding functions if it loses the subpoena proceeding unless it first controverts in the district court an allegation that it has no "new evidence."

These considerations demonstrate that the doc-

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[6] This case need not be complicated by abstract consideration of the question whether "substantial evidence" constitutes more or less than a "*prima facie* case," a matter much discussed by the court below (R. 83-85). While the Securities Exchange Act, like most other statutes, is silent on the subject of what constitutes substantial evidence, the Commission does not doubt that its findings of fact should always be sustained by what is, in its view, a fair preponderance of the evidence. The substantial evidence rule is simply a measure of judicial forbearance in the face of attack on agency findings.

trine of *res judicata* cannot be availed of so as to cause a ruling in an ancillary proceeding to frustrate the statutory grant of primary jurisdiction to an administrative body. They also show that the defense can be raised, if at all, only before the administrative body itself and a statutory court of review, and not in a suit to enjoin use of the statutory procedure.[7]

2. The issue which was before the District Court in the subpoena action and the issue in the pending administrative proceeding are not the same. Many cases establish that determinations in preliminary or ancillary proceedings in which the question is one of probable cause are not *res judicata* when the ultimate issue comes before the courts on the merits.[8] These close analogies prove

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[7] If the Commission is permitted to hold its administrative hearing, the arguments of Otis & Co. concerning *res judicata*, and any related arguments based on the significance of the District Court's ruling in the subpoena case, will have a concrete setting in the context of an actual, not a hypothetical, administrative record. It will then be possible to *know* whether the evidence before the Commission differs substantially from that before the Court in the subpoena proceeding, if that is material. It is impossible now to forecast the significance of according Otis & Co. the rights of a party, including the right of cross-examination, in the absence of which the District Court held that the evidence relied on to show a *prima facie* case of fraud must be "subjected to the strictest scrutiny for possible ambiguity and equivocation" (R. 43). Nor is it possible to forecast whether the witnesses' testimony at such a hearing will vary from their testimony upon the preliminary investigation, or to determine the significance of any variance that may occur.

[8] Re-arrest and trial after discharge upon a preliminary examination: *Ex parte Crawlin*, 92 Ala. 101, 9 So. 334; *Ex parte Fenton*, 77 Cal. 183, 19 Pac. 267; *In re Garst*, 10 Neb. 78, 81, 4 N.W. 511; *Ex parte Oxley*, 38 Nev. 379, 383, 149 Pac.

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that the issue of probable cause is not regarded as the same issue as that on the merits of the proceeding, or, what is equally decisive here, that *res judicata* may not be invoked in such situations.

3. The detrimental effect of the decision below upon the general fact-finding functions of administrative agencies is by no means limited to instances where an agency attempts to pierce a claim of attorney-client privilege by showing *prima facie* fraud. Factual exploration by such agencies, whether in the course of investigations or in the course of adversary proceedings, is dependent in the long run upon the aid of the courts, for it is to the courts that they must resort for enforcement of their subpoenas. The number and scope of the issues that may arise in such proceedings are limitless. Thus, a witness may refuse to testify on a certain subject on the ground of immateriality. The question of materiality may in turn hinge upon the probable truth of propositions A, B and C, which may be central issues in the

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992, 993; cf. *United States* ex rel. *Rutz* v. *Levy*, 268 U. S. 390, 393.

Removal proceedings after discharge for lack of probable cause in an earlier removal proceeding: *United States* ex rel. *Rutz* v. *Levy*, 268 U. S. 390; *United States ex rel. Povlin* v. *Hecht*, 48 F. 2d 90, 91 (C.A. 2).

Re-indictment after quashing of earlier indictment for failure to present *prima facie* case to grand jury: *People* v. *Roth*, 128 Misc. 550, 220 N.Y.S. 167; *People* v. *Horvatt*, 237 App. Div. 289, 261 N.Y.S. 303, affirmed *sub nom. People* v. *Mangan*, 262 N.Y. 508, 188 N.E. 41; *Hill* v. *State*, 20 Ala. App. 197, 101 So. 298; cf. *Brady* v. *United States*, 24 F. 2d 397, 405 (C.A. 8), certiorari denied, 278 U. S. 603.

administrative proceeding or wholly collateral to it. If the agency involved cannot convince the enforcement court of the probable truth of propositions A, B and C, it may not obtain an order compelling the testimony of the recalcitrant witness. But, under the decision below, propositions A, B and C are in effect carved out of the issues involved in the agency proceeding, for the agency is bound by what the court determines in the proceeding to enforce the subpoena. And those propositions become the subject of district court determination (subject to appeal) before they may be acted upon by the agency and subsequently by the statutory appellate court sitting in review of final agency action. Thus, the subpoena-enforcement proceeding intended by the Congress as an aid to administrative fact-finding becomes a trap in which the agency proceeding is disrupted and delayed.

The decision below also weakens the important rule permitting the attorney-client privilege to be pierced upon a showing of *prima facie* fraud in the relationship. *Clark* v. *United States,* 289 U.S. 1, 15. Any person attempting to obtain evidence by piercing the claim of privilege will pause before taking the risk that an adverse ruling as to the privilege may be *res judicata* as to his case on the merits.

The decision below applies, moreover, with equal logic and with equally bad consequences to judicial discovery proceedings, which have been said by this Court to be "essentially the same" as admin-

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istrative fact-finding and to be "governed by the same limitations." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 216. If, during the course of a judicial proceeding in jurisdiction A, the court is not satisfied that probable cause has been shown to compel certain testimony, that is not a bar to a later attempt to prove the basic issue in the case. However, if ancillary discovery proceedings are conducted in jurisdiction B, then any issue decided in the discovery proceedings, however tentatively, and whether for the one side or the other, is binding for all purposes in jurisdiction A; and the trial in the first court must be suspended while efforts are made to change the mind of the second court with "new evidence." We have been unable to find any precedent for such a procedure.

4. The petitioners should not be required to answer and let the case be tried in the District Court instead of by the Commission before obtaining review of the holding of the court below. The decision below is so patently inconsistent with the basic doctrine of the *Myers* case that it should be reviewed now without permitting further delay. In the many *Myers*-type cases before this Court a writ of certiorari has typically been granted without requiring the agency to answer and stand trial in the district court.[9]

[9] While the petitioners have not yet answered the allegation that there is no "new evidence," and while they do not mean to imply that they will admit that allegation, it may be inferred from the history of this proceeding that the peti-

5. What has been said is apart from the importance of this case itself in the administration of the securities laws. The process of raising capital by the flotation of securities is geared in large part to the good faith of investment bankers when they give the issuing corporation a firm commitment. When there are suspicious circumstances in connection with the disavowal of such a commitment, there is great public concern. A proceeding before the expert administrative body looking toward a final determination of the question whether there has been a violation of the securities statutes in such a case should not be aborted by the novel application of doctrine which was never meant to frustrate the functioning of the administrative process in the manner prescribed by Congress.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

AUGUST, 1949.

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tioners know of no startling piece of "new evidence" whose production in the District Court would result in a final judgment for them under the decision below and hence render academic the questions raised by this petition.

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APPENDIX

The pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* are as follows:

SEC. 15. (a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) * * * * *

The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, * * * (D) has willfully violated any provision of the Securities Act of 1933, as amended, or of this title, or of any rule or regulation thereunder. * * *

SEC. 15A. (l) The Commission is authorized, if such action appears to it to be necessary or

appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

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(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder, or (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation; * * *.

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SEC. 21. (a) The Commission may, in its discretion, make such investigation as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning

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the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring

such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. * * *

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SEC. 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the United States Circuit Court of Appeals for the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court

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for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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